Public Utility Land Use Rights
Crossing Native American Reservation Lands

Public Scoping Meeting
Section 1813 of the Energy Policy Act of 2005
Study on Indian Land and Rights of Way

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Introduction: This paper addresses several issues pertinent to utility transmission rights of way crossing Native American Tribal Trust lands. These issues are not specific to any company or tribe but are prevalent in all states with Tribal Trust lands.

Author Biography: Mr. Shepard joined WRC in January 2004 and is speaking on behalf of FAIR. He is responsible for the administration and operation of land rights acquisition for multiple agency and public utility natural gas pipeline and electric distribution and transmission projects and base load work. In addition to his current position he worked for Sempra Energy, parent company for San Diego Gas & Electric and Southern California Gas Company both regulated public utilities. He has additionally worked for non-regulated affiliates Sempra Atlantic Gas (Nova Scotia, Canada) and Sempra Energy Resources (California, Arizona, Connecticut, Louisiana and Florida).

He has 38 years of land rights acquisition and management experience with communications, electrical, and natural gas distribution and transmission lines. He is experienced with both high pressure gas systems and 4KV to 500KV electrical systems. His experience includes work with local and state agencies including the Bureau of Land Management, Bureau of Indian Affairs, Native American Tribal Councils, California Coastal Commission and State and Federal Forest Services.

Issue 1: Determination of Land Rights Fees (Slide No. 1)

There are several accepted methods to establish the fair market Value (FMV) of real property. When establishing land values for the purchase of land rights, it is common practice to obtain the services of an independent MAI Appraiser (Member Appraisal Institute) to evaluate what the FMV of a property should be. The Appraisal Institute MAI membership designation is held only by those appraisers who are experienced in the valuation and evaluation of commercial, industrial, residential, farm and other types of properties, and who advise clients on real estate investment decisions. They are required to pass a rigorous series of examinations and have a minimum of 6,000 hours of experience all meeting strict criteria.

Fair market values are normally determined by evaluating sales of comparable properties based upon the highest and best use of the property. Not necessarily the current use. The highest and best use of property is determined based upon an evaluation of community general plans, special use districts, zoning, etc. The value of a easement right of way crossing real property is then valued as a percentage of the total land rights as granted or negotiated for, and further as described in an easement document, based upon the MAI fair market appraisal.

Moreover, easements on private lands are almost always granted in perpetuity. Fee land rights owned in perpetuity are understood by the professional Land Agent as actual ownership of all the rights that run with owned land. In other words, a person owning fee title to a parcel of land owns all the rights to that particular parcel (use of the land consistent with zoning restrictions, air above the land, mineral rights, rights to grant to others, etc. While this is the standard method of valuing land rights on private lands, it does not apply to Tribal Land Trusts. In my experience, with no formal standards imposed, easement fees asked of public utilities by Tribal Councils many times are far in excess of any determinable fair market value by multiples as much as 400% in my experience. In addition these rates are for temporary rights with fixed expiration dates.

It is important for Native American Tribal Councils to follow a fair, independent and recognized formal method for determining fees paid by utilities for rights of way crossing tribal trust lands. It is also important that easement grants be given in perpetuity rather than for temporary periods of time in order to secure the reliability of the country's electric transmission and gas system grids as discussed further below.

Issue 2: Land rights in perpetuity vs. temporary land rights. (Slide No. 2)

Fee land rights owned in perpetuity, as previously described, are understood by the professional Land Agent as actual ownership of all the rights that run with owned land. On the other hand, land rights with definable termination dates, are rights to "use" the land as compared to actual ownership of certain land rights.

Considering a utility easement for example, the utility invests significant amounts of capital funds for the construction of facilities within utility owned rights of way. The cost of this investment is returned to the utility over many years, in some cases 20 or more. In today's business environment it is irresponsible for a utility to invest these enormous sums in rights of way with "temporary" use rights.

Utilities that accepted temporary rights in the past 30 to 50 years are now finding that these temporary rights are expiring and utilities must once again pay for these same rights or if necessary, in some cases, relocate and rebuild off trust lands at great expense to the consumer. In many cases existing facilities within temporary easement land rights are seen by land owners as opportunities to negotiate for enormous rents far in excess of fair value for continued temporary rights. In many cases relocation of the utility it is not a viable option due to length, cost, environmental impacts, existing customers, etc. A negotiated imbalance is thus created.

Issue 3: Undesirable Environmental impacts when public utilities are forced to relocate existing facilities. (Slide No. 3)

Land uses -- In most cases existing gas and electric transmission facilities were constructed many years ago in rights of way that, when constructed, crossed open land such as farm, desert, forest and vacant non-developed land. Numerous alternative alignments were available. Those same rights of way today have been encroached upon

by community urbanization and lands once wide open now are fully developed. Essentially alternative alignments are extremely few if they exist at all. Many existing land uses and regulations prohibit the construction of gas or electric transmission facilities. Local community councils and boards are beholding to the voters and to be blunt most community citizens do not want new major gas and electric transmission facilities constructed within rights of ways passing through their neighborhoods. Unfortunately, NIMBYism is very much alive.

Habitat – Natural habitat that was once plentiful many years ago has been seriously impacted over the last 30 or 40 years as a result of urbanization and is becoming scarcer. Constructing new facilities in order to replace existing lines that now occupy temporary rights of way such as those crossing Native American or military reservation lands is compounding the problem of vanishing habitat. Economically forcing the relocation of existing facilities is potentially very detrimental to existing habitat and endangered species.

Natural resources required to construct new facilities – Considerable natural resources are required to fabricate new steel pipe and/or electric transmission facilities. It is a highly energy intensive process and unnecessary if existing facilities currently crossing Native American or military reservation lands can economically remain in their existing rights of way.

It is important to note that electric transmission towers can not be relocated to new locations and re-used. They are individually designed for specific locations based upon topography, wind loading, geological conditions, and loading or weight of the wire and pulling tensions. High pressure gas pipeline is also held to similar extremely high tolerances due to the obvious potential of pipeline ruptures.

Historical/Archaeological – Relocating existing gas or electric transmission facilities can potentially impact known or previously unknown historical and archaeological sites. Potential impacts from pipelines are greater than from electric transmission lines.

Planning and Design - 30 to 40 years ago, with few restrictions, Engineers designed utility transmission routes along the shortest distance between tow points. The theory was that the shortest distance was the least impactive to the land and least expensive to the consumer who eventually pays for the cost in their monthly utility bill. Today utility design standards are far more sophisticated and straight lines are neither possible nor desirable.

Engineers, with the assistance of archaeologists, land use planners, land agents, agencies and community planning groups design utility transmission facilities attempting to avoid environmentally sensitive, urbanized areas, archaeological, military and Native American Trust lands if at all possible. Avoiding these restraints adds significant length, cost, environmental and land use impacts that a more direct shorter route would avoid.

If alternative routes prove to be unfeasible after evaluations and public review, only then are potential routes through Native American Trust lands seriously considered. The utility however expects very difficult and lengthy negotiations, temporary land rights if successful at all and rents up to hundreds of times more than FMV's.

Issue 4: Negotiations (Slide No. 4)

Under current policy, there is a lack of well-defined timetables for negotiations. As a result it is not unusual for meetings to be postponed several times and company land representatives to be left waiting. When offers are finally able to be presented in order to begin negotiations, tribal representatives can be non-responsive to offers regardless of the potential community need and feasibility of proposed alignments. Many, if not most public utilities will select alignments avoiding reservation lands if feasible alternatives are available even when they are more expensive to build, longer and have more environmental and/or land use impacts.

Comparison: Military Reservation Lands

While it is also difficult to obtain necessary approvals for utility transmission rights of way crossing military reservations it is not impossible. There is an established process of application, review (including valuation) and final decision at different levels in the military chain of command depending upon the value of the proposed land rights. Normally any out grants (easement, license, etc.) of military land in excess of $200,000 requires approval by the Secretary of the military branch and the President of the United States. Any permanent grants require Congressional approval.

The primary difference between land grants crossing military reservations and Native American Tribal Trust lands is an established formal review, valuation and approval process. That formal process insures that proposed natural gas, electric and other utility such as communications, transmission projects in the public interest are fairly evaluated and permitted when so determined for construction.

Example: Southern California 500KV electric transmission project. (Slide No. 5)

In 2000 a Southern California Company proposed and began the permit process for the construction of a new 30 mile (approximately 120 towers), $360 Million dollar, 500 KV electric transmission line between a substation in northern San Diego County to a another Southern California utility substation in southern Riverside County, California.

The purpose of the transmission line was to ensure regional energy reliability and to bring needed electrical energy to San Diego County from renewable energy resources and to be able to transmit electrical energy north to Los Angeles County north of San Diego in order to help minimize summer peak brownouts and potential outages. In 2002 the PUC halted the proposed project stating that it was to expensive and unneeded despite utility and independent projections identifying expected energy shortages by the year 2010.

The primary and alternate alignments for this project passed through a San Diego County Reservation. The Reservation is south of an urbanized community in Riverside County and adjacent to National Forest Service Lands. The level of existing urbanization and Forest Service refusal to grant approval for any new utility rights of way through Forest Service Park lands forced the proposed alignments through the reservation. Efforts to negotiate between the Tribal Council proved fruitless. The correct forum for successful negotiations did not exist.

In 2005 the Southern California utility proposed and began studies and preliminary design work in order to file permit applications for a new 500KV electric transmission line from Imperial County, California north to southern Los Angeles County. The project, if approved will be approximately 125 miles in length, cost $1.4 Billion dollars and traverse the California Anza-Borrego Desert State Park. The need for this project is to serve the projected growth of San Diego County and Southern California by the year 2010 and to take advantage of renewable energy development in Imperial County.

Once constructed this project will have cost Southern California consumers $1.04 Billion dollars more than the initially proposed project. It additionally will be 95 miles longer and require some 500 electric transmission towers approximately 380 additional towers over and above what was needed for the initially proposed project.

Conclusion: (Slide No. 7)

In order to insure that natural gas and electric transmission and other similar projects that benefit the tribe, public and national interest of the United States receive fair and impartial evaluations and good faith negotiations occur and it is vital that formal review and approval processes are in place for proposed projects crossing Native America Tribal Reservation lands.

In the void of or lack of transparent, fair and equitable utility transmission right of way valuation standards the United States can expect significant increases in the already high costs of energy and increasingly significant decreases of system reliability and energy delivery to the consumer. Fair valuation standards will help lower and keep existing energy rates affordable and reduce the overall cost of fulfilling our country's energy needs.